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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. GARY JORDAN SINGER, Defendant and Appellant.	C086984 (Super. Ct. Nos. 17F3063, 17F2631, 17F5608)

A jury found defendant Gary Jordan Singer guilty of possessing a shuriken (a weapon colloquially known as a throwing star) and resisting arrest; he later pleaded no contest to attempted burglary. For these convictions, and others in an unrelated case, the trial court sentenced defendant to an aggregate term of 10 years eight months in state prison. On appeal, defendant contends there was insufficient evidence to convict him of

possessing a shuriken. Defendant also contends the prosecutor committed *Griffin*[1] error and additional misconduct during closing arguments. We affirm the judgment.

I. BACKGROUND

In May 2017, Victoria woke in the early morning hours to the sound of her window rattling. She looked out the window and saw a man (later identified as defendant) looking back at her. Victoria called 911.

Officer Dennis Mack received the call from 911 dispatch. The dispatcher told Officer Mack the suspect was a bald, white, man, wearing a backpack, black pants, and a black shirt. Two minutes later, as he drove to Victoria's, Officer Mack saw defendant walking down the street. Defendant was wearing a military style backpack. Officer Mack stopped defendant, sat him down, took a photo of him using his cell phone, then left him with Officer Russ Veilleaux. Officer Mack continued on to Victoria's apartment.

After speaking with Victoria, and having her identify defendant through the photograph, Officer Mack attempted to arrest defendant. Defendant struggled with both officers as they tried to handcuff him. Once he was handcuffed, the officers cut off defendant's backpack. Officer Mack searched the backpack. He found the backpack "filled" with items consistent with a person being transient: "Clothing, hygiene items, stuff of that nature." He opened the "front pocket" on the backpack and immediately saw a "ninja throwing star."

The People subsequently charged defendant with attempted first degree burglary, possession of a shuriken (the throwing star), and resisting arrest. The People further alleged defendant was out on bail when he committed the crimes, was previously convicted of a serious felony, and served four prior prison terms.

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[1] *Griffin v. California* (1965) 380 U.S. 609.

During trial, the throwing star taken from defendant's back pack was admitted into evidence. The star was metal, had six points, a sharp edge, and no handles. A jury found defendant guilty of possessing a shuriken and resisting arrest. The jury could not reach a verdict on the charge of attempted first degree burglary and the court declared a mistrial on that charge. In a bifurcated trial, the trial court found true the allegations that defendant previously served four prison terms.

In a later negotiated plea agreement, defendant pleaded no contest to the attempted burglary charge in exchange for the People moving to dismiss three other cases pending against him. The court sentenced defendant on this and another unrelated matter to an aggregate term of 10 years and eight months in state prison.

II. DISCUSSION

A. Sufficiency of the Evidence

Defendant contends there was insufficient evidence to support his conviction for possession of a shuriken. We disagree.

" 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.) A reviewing court does not reweigh evidence or reevaluate a witness's credibility. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

Penal Code section 22410 penalizes the possession of "any shuriken."[2] A " 'shuriken' means any instrument, without handles, consisting of a metal plate having three or more radiating points with one or more sharp edges and designed in the shape of a polygon, trefoil, cross, star, diamond, or other geometric shape, for use as a weapon for throwing." (§ 17200.)

In order to convict defendant of illegally possessing a shuriken, the People must prove that: (1) defendant possessed the weapon; (2) defendant knew he possessed the weapon; (3) defendant knew the object was a weapon; and (4) the weapon was of a type commonly known as a shuriken. (CALCRIM No. 2500.) Defendant argues there was insufficient evidence he knew the object in his backpack was a shuriken.

The court instructed the jury that a shuriken is a handleless "metal plate having 3 or more radiating points with one or more sharp edges . . . ." The jury saw the object taken from defendant's backpack. The object was metal, it had a sharp edge, more than three radiating points, and no handles. It is therefore immediately obvious to anyone who sees it that it has the characteristics necessary to fall within the statutory description. (See *People v. King* (2006) 38 Cal.4th 617, 627-628 [defendant knew by looking that the shot gun was "unusually short," thus knew of the characteristic necessary to fall within statutory description of a sawed-off shotgun].) Whether defendant knew it was called a shuriken, or that it was illegal to possess one, is not relevant to a defense that is recognized in California. (*Ibid.*)

Officer Mack testified that when he first saw defendant, defendant was carrying his backpack. That backpack was "filled" with things defendant would use on a daily basis. In the front pocket of defendant's backpack is where Officer Mack found the

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[2] Undesignated statutory references are to the Penal Code.

shuriken. It was not hidden or tucked away but was immediately visible upon unzipping the pocket.

Reviewing the evidence in a light most favorable to the judgment, it was reasonable for the jury to conclude that defendant knew the shuriken was in his backpack and, at some point, he had seen the shuriken. Having seen the shuriken, defendant would know its characteristics: that it was metal, without handles, and had a sharp edge with more than three radiating points. Accordingly, we find the evidence was sufficient to support defendant's conviction for possession of a shuriken.

B. Griffin Error/Burden Shifting

Relying on a single statement made by the prosecutor during closing arguments, defendant contends the prosecutor committed misconduct by calling attention to the defendant's decision not to testify (*Griffin* error) and shifting the burden of proof to defendant. We conclude he forfeited his claim of *Griffin* error by failing to raise that objection in the trial court and failed to demonstrate how he was prejudiced by trial counsel's failure to object. We further conclude the prosecutor did not shift the burden of proof to defendant.

After the close of evidence, the prosecutor and defense counsel presented closing arguments. With regard to the charge of possessing a shuriken, defense counsel argued the People failed to prove beyond a reasonable doubt that defendant knew the shuriken was in his backpack and that it was, in fact, a shuriken: "What evidence do you have? Again, it's all circumstantial. The circumstantial evidence is that the item, the shuriken, was in [defendant]'s backpack. [Defendant] had his backpack on. . . . .

"How many items were in that backpack? Was this shuriken the only item in that outside pocket? Was it picked off of the ground? Did someone—did [defendant] know what it was? Where is the evidence of any of this?

"[¶] . . . [¶]

" . . . where is the knowledge that it was in the backpack with all of the other personal belongings and indicia of hygiene, clothing, et cetera? And where is the knowledge that [defendant] knew what it was? Simply holding it up and saying this is what it is, does that necessarily mean that somebody knows that? Did you all know that?"

In rebuttal, the prosecutor argued, "[s]o the only evidence you have is what you heard up there. What I say is not evidence, what counsel says is not evidence, and you have to follow the law even if you don't like the result. That's the truth of it. That's the law. So you can't make stuff up.

"[¶] . . . [¶]

". . . you can't just make stuff up. When the facts and the evidence are against you, sometimes it's just like that, but you can't make stuff up. You were told, 'Well, maybe the throwing star, the defendant had just picked it up off the ground and maybe'—maybe nothing. That's not evidence. You don't have any evidence of that. You can't make stuff up. Sometimes things are as simple as they appear. And you can't just make things up because the actual facts are against you.

"[¶] . . . [¶]

"So that's the testimony is that [Officer Mack] unzipped that little outer pocket and immediately saw the throwing star. So another inconsistency. Well, [defendant] knew everything that was in the backpack except the bad stuff he got caught with. That doesn't make sense.

"You have to accept the reasonable and reject the unreasonable. The defendant's out there dressed like a ninja, and he's the only one in America that doesn't know what the throwing star is. He's got the black pants and the black shirt and the ninja weapon, but he doesn't know what that is? No. You accept the reasonable over the unreasonable. There's no evidence that he just happened to stumble across this very dangerous, very sharp weapon on the ground. You didn't receive any evidence of that."

Defense counsel objected: "[O]bjection. Prosecutorial misconduct. Shifting the burden.

"[THE PROSECUTOR]: No. I'm just commenting on the evidence that's here, Your Honor." The court overruled the objection.

The prosecutor finished his argument on the possession charge: "So when you just make stuff up, when it's not evidence in court, it can't be something that you base your verdict on. You can't just say 'Maybe he picked it up off the street and whatever.' No. You have to base your verdicts, ladies and gentlemen, on the facts that you received, the testimony and the evidence. That's all you can do. That's what your charge is."

After closing arguments, the court dismissed the jury and allowed defendant's trial counsel to further argue her objections. Counsel argued again that there was a "shifting of the burden in terms of proving or suggesting to the jury that the Defense needed to prove how the shuriken came into [defendant]'s possession and that there was some need to prove that he found it on the ground . . . ." The prosecutor argued again that he was merely commenting on the evidence, not shifting the burden. The court maintained its decision to overrule the objection.

1. Griffin Error

a. Forfeiture

Defense counsel did not object to the prosecutor's argument or comments on the basis they improperly asked the jury to consider the defendant's failure to testify (*Griffin* error), instead objecting only on the ground that the prosecutor was shifting the burden of proof to defendant. Defendant's failure to object to the alleged *Griffin* error forfeits his right to challenge the issue on appeal. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1050.)

b. Ineffective Assistance of Counsel

Having forfeited his claim of *Griffin* error, defendant alternatively argues that trial counsel's failure to raise a *Griffin* error objection rendered counsel's assistance

ineffective. Whether counsel was ineffective for failing to object to the prosecutor's comments on the basis of *Griffin* error, there was no resulting prejudice to defendant.

To establish ineffective assistance of counsel, defendant must show, by a preponderance of the evidence, that " '(1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant.' " (*People v. Johnson* (2015) 60 Cal.4th 966, 980.)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697 [80 L.Ed.2d 674].)

We cannot find a reasonable probability that but for the failure to raise a *Griffin* error objection to the prosecution's statement in rebuttal, the result of the trial would have been different. The trial court instructed the jury with CALCRIM No. 355, that "A defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence and argue the People have failed to prove the charges beyond a reasonable doubt. Do not consider, for any reason at all, the fact that the defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way." This instruction unambiguously addressed the weight the jury could attach to defendant's silence.

The trial court also instructed the jury under CALCRIM No. 220 that the prosecution bore the burden of proving beyond a reasonable doubt that defendant committed the charged crime. And, the trial court instructed the jury with CALCRIM No. 222, that statements by the prosecutor are not evidence.

Had defense counsel objected and the trial court sustained an objection on the basis of *Griffin*, the trial court would have admonished the jury with similar instructions. This "may have had some marginal benefit" to defendant. (See *People v. Mesa* (2006) 144 Cal.App.4th 1000, 1011.) Based on the evidence of defendant's guilt, however, the entirety of the prosecutor's closing argument, and the limited nature of the indirect *Griffin* error alleged by defendant, "which did not involve any direct comment on the defendant's failure to testify, let alone (as occurred in *Griffin*) the actual suggestion the jury could consider the defendant's failure to testify in assessing his guilt," we are not convinced it is reasonably probable the jury would have reached an outcome more favorable to defendant had trial counsel objected. (*Ibid.*)

2. Burden Shifting

Relying on that same statement made by the prosecutor during rebuttal, defendant also contends the prosecutor committed misconduct by shifting the burden of proof in violation of defendant's rights under the Fourteenth Amendment to the United States Constitution. We find no misconduct.

When, as here, the prosecutor is alleged to have engaged in prosecutorial misconduct during closing argument, the question " 'is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " (*People v. Harrison* (2005) 35 Cal.4th 208, 244; see *People v. Clair* (1992) 2 Cal.4th 629, 663.) The prosecutor's statements are examined in the context of the entire argument and the instructions given to the jury. (See *People v. Morales* (2001) 25 Cal.4th 34, 44-46.) We also consider " ' "whether the prosecutor's comments were a fair response to defense counsel's remarks." ' " (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1337; see *People v. Chatman* (2006) 38 Cal.4th 344, 386 ["Defendant's challenges to rebuttal must be evaluated in light of the defense argument to which it replied"].) We do not lightly infer that the jury drew the most, rather than the

least, damaging meaning from the prosecutor's statements. (*People v. Shazier* (2014) 60 Cal.4th 109, 144; *People v. Dykes* (2009) 46 Cal.4th 731, 771-772.)

"Comments on the state of the evidence or on the defense's failure to call logical witnesses, introduce material evidence, or rebut the People's case are generally permissible. [Citation.] However, a prosecutor may not suggest that 'a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.' " (*People v. Woods* (2006) 146 Cal.App.4th 106, 112.)

Here, defense counsel argued there was no evidence defendant knew the shuriken was in his back pack, or that he knew it was a shuriken. Counsel suggested the shuriken may have been "picked off of the ground." The prosecutor responded to that argument by noting there was no evidence that defendant "happened to stumble across" the shuriken "on the ground." This was a comment on the state of the evidence, not a suggestion that defendant had the burden to produce that evidence. "A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340.)

Accordingly, we conclude there was no misconduct.

III. DISPOSITION

The judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

BLEASE, Acting P. J.

/S/

DUARTE, J.